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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., AND 1165 PARK AVENUE CORPORATION, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 1040–1046) is reported in 156 F. 2d 982.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 23, 1946 (R. 1047). The petition for a writ of certiorari was filed in this Court on September 21, 1946. The jurisdiction of this Court is invoked under

Section 204 (d) of the Emergency Price Control Act, as amended (50 U. S. C. App., Supp. V, 924 (d); hereinafter termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Does Section 2 (b) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 902 (b)), require that the Rent Regulation for Housing, establishing maximum rents for apartment houses in the New York City Defense-Rental Area, must, to be generally fair and equitable, permit landlords of such housing accommodations to earn in general the fixed or definite rate of return on their investment traditionally afforded to public utilities?

2. Is Section 2 (b) of the Act, if not so construed, in violation of the Fifth Amendment to the Constitution?

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended, appear in the Appendix, *infra*, pp. 24–37. The Rent Regulation for Housing in the New York City Defense-Rental Area appears in the Federal Register (8 F. R. 13914).

STATEMENT

The Rent Regulation for Housing in the New York City Defense-Rental Area establishes as the maximum rents for housing accommodations in

the Area the rents in effect on March 1, 1943 (Section 4 (a), *infra* p. 29).[1]

Petitioners, the owners of apartment houses rented in New York City, filed a protest with the Price Administrator attacking the validity of the maximum rents established by the Rent Regulation (R. 1–10).[2] The protest was sponsored by the New York City Metropolitan Fair Rent Committee, a voluntary association consisting of landlords or owners of housing accommodations in

[1] For accommodations not rented until after March 1, 1943, the landlord is permitted to charge any rent he desires, subject to the authority of the Administrator to decrease such maximum rent to the level of the rent for comparable housing accommodations which prevailed on March 1, 1943 (Sections 4 (c), 4 (d) and 4 (e), *infra*, pp. 29–31).

The maximum rents established by the Regulation may be increased upon petition to, and order by, the Office of Price Administration in various situations where the particular housing accommodations have been altered substantially since March 1, 1943, or where the rent on that date did not represent the product of arms length bargaining between landlord and tenant (Sections 5 (a) (1)–5 (a) (11), inclusive, and Section 5 (a) (13), *infra*, pp. 31–37). In addition provision is also made for increasing maximum rents for individual landlords who are in a position of financial hardship under rent control by reason of increases in operating costs. (Section 5 (a) (12) of the Regulation and Section 2 (c) of the Act, *infra*, p. 35 and pp. 26–27).

[2] The Regulation became effective November 1, 1943, and the protest was filed approximately one month thereafter (R. 1). Various matters raised in the protest were brought for review by petitioner 1165 Park Ave. Corporation to the Emergency Court, and that petitioner's complaint was dismissed, *1165 Park Ave. Corp.* v. *Bowles*, 150 F. 2d 117. This decision is not involved here, petitioner 1165 Park Ave. Corporation having been permitted in 1946 to join with the other petitioners in this proceeding (R. 829, note 1).

New York City (R. 2). In the protest, the petitioners objected to the Regulation primarily on the ground that the maximum rents established for housing accommodations generally in the New York City Area were not generally fair and equitable and were not effectuating the purposes of the Act, as required by Section 2 (b) thereof, (*infra*, pp. 25–26), and insisted that the Administrator should be ordered to increase such maximum rents by amounts equal to 10% of the March 1, 1943 maximum rents (R. 3).[3] In support of their protest, the petitioners introduced evidence to show that the "average operating profit" under rent control of landlords generally in New York City had deteriorated because of generally increased operating costs to the point where such profit would not compare favorably with the average operating profit of landlords during the year 1940—which petitioners advanced as a proper base period for comparison (R. 3, 8, 476).

Voluminous evidence was introduced by the Administrator in the course of the protest proceedings showing the earnings position of the New York City apartment house industry currently and since 1939.[4]

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[3] The petition points out (Pet. 3) that long after the complaint was filed in the court below (R. 843), petitioners substituted a request for a 15% general increase in maximum rents for all accommodations in New York City.

[4] In accordance with consistent administrative practice, the Accounting Department of the Office of Price Administration has surveyed the financial position of landlords gener-

After the proceedings summarized in the note below[5] the Emergency Court of Appeals in a

ally in the New York City Defense-Rental Area since 1939. These surveys cover every six months of operation under rent control. There are three such surveys in the record, the most recent survey covering each of the years from 1939 through Dec. 31, 1944, inclusive (R. 121–171, 175–198; 747–767, 977–998), although the printing of one entire survey and portions of the latest survey was dispensed with by stipulation of the parties (R. 1049–1050). The Office of Price Administration has recently completed and published its survey for the calendar year 1945. See *Rental Housing Operation Under Rent Control, New York City* (October 1946), Financial and Statistical Analysis Branch of the Rent Department, OPA. This latter survey was not completed until after the decision in the court below. The data in the surveys are obtained directly from the books of landlords (R. 121–124; 978–984). Accepted statistical techniques of sampling are used. Petitioners do not question the results shown by these surveys (Pet. 5, 10).

[5] The protest was originally denied on August 30, 1944, on the ground that the data then available to the Administrator showed that the financial position of landlords in the New York City Area was more favorable under rent control than during the years 1939–1940 and that therefore the Rent Regulation was generally fair and equitable. (R. 457, 458–503). The Administrator also rejected the contention of petitioners, which was not raised in the protest but set forth for the first time during the course of the protest proceedings, that the Act required maximum rents to afford landlords a fair return on their investment in order to be generally fair and equitable (R. 496–498). Complaint was filed with the Emergency Court on September 29, 1944 (R. 843–854). The court entered its judgment on June 25, 1945, setting aside the Regulation insofar as it applied to housing accommodations the maximum rents for which were $100 or more (R. 960–975). The court held that: "the year 1939 was the last normal prewar year in New York City and was, therefore, the appropriate period for use in testing the validity of the regulation here in question" (R. 963). The court found, on the

unanimous opinion finally dismissed the complaint (R. 1040–1046, 1047). The court held that, to be generally fair and equitable under Section 2 (b) of the Act, a Rent Regulation must not prevent landlords generally from earning a net operating income under rent control at least equal to the net operating income which they earned during a representative peacetime period, and that such a period in the New York City Defense-Rental Area was 1939.[6] The court specifically rejected peti-

basis of the evidence then in the record, that although the Rent Regulation was not preventing owners of housing accommodations whose maximum rents were less than $100 from attaining a financial position as favorable as that which they enjoyed in 1939, it was operating to that effect with regard to owners of housing accommodations whose maximum rents were $100 or more and so set aside the Regulation in part. One judge dissented on the ground that the Regulation was valid in its entirety (R. 974–975). The court found that petitioners' argument that landlords generally were not earning a fair return on their investment was unsupported by fact. Upon motion of the Administrator, and submission by him of his most current survey of the financial position of the landlords, which tended to show that the Regulation was not preventing landlords of housing accommodations whose maximum rents were $100 or more from attaining a financial position as favorable as that which they enjoyed during 1939, the court vacated its judgment, remanded the case to the Administrator for the taking of further evidence and restored the case to the calendar for rehearing (R. 977, 977–998). Further evidence was taken (R. 505–828) and, after issuing a supplemental opinion reaffirming his denial of the protest on the basis of all the evidence in the record as supplemented, the Administrator filed the supplemental transcript with the court (R. 829–842). The case was then reargued (R. 1038).

[6] Taking the year 1939 as the base period is more favorable to petitioners than the year 1940 or the years 1939–1940

tioners' contention that the Act required that a Rent Regulation, to be generally fair and equitable, must assure landlords generally a fair return on their investment, in accordance with traditional public utility concepts of fair return and fair value of the investment. The court then found that the Rent Regulation did not prevent landlords generally, including those who owned properties containing housing accommodations whose maximum rents averaged $100 or more, from earning a net operating income as favorable as the net operating income they earned during 1939.[7] In fact, the record

because the financial position of landlords was better in 1939 than in 1940 (R. 747, 748).

[7] The term "net operating income", as used by the Administrator and the court below, denotes actual rental income from the properties, after deductions for *all* expenses (including expenses for repairs, maintenance, insurance and taxes and administrative expenses), but not for fixed charges (depreciation and interest). The term "net income" denotes actual rental income after deductions for all expenses and for fixed charges. Although the Office of Price Administration obtained some figures on the net income of landlords in New York City, "net operating income" is used as the standard because (1) a great many landlords do not show charges for depreciation and interest on their books, and (2) if the current net operating income of landlords is as favorable as it was during the base period, it is obvious that their current net income will be, comparatively, even more favorable, in view of the fact that depreciation charges have been stable since 1939 while interest rates have fallen (See Statement of Deputy Administrator for Rent, *I Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376, p. 109). The Tables set forth in the text, *supra*, p. 8, clearly illustrate this point.

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shows (R. 747, 748, 985–998) that not only was the net operating income of landlords greater in 1944 than it was in 1939 but their net income in 1944 was more than twice their net income in 1939.[6] The following tables show the comparative position of the landlords (R. 747, 748, 763, 764):

Comparative Position of 50,129[1] Rental Units for Which Net Operating Income Was Reported

	Net operating income	
	Index	Dollars
1939	100	$10,498,447
1944	102.3	10,738,438

Comparative Position of 31,540[1] Rental Units for Which Both Net Operating Income and Net Income Was Reported

	Net operating income		Net income	
	Dollars	Index	Dollars	Index
1939	$7,029,343	100	$947,884	100
1944	7,417,727	105.5	1,987,413	209.7

[1] These 31,540 Rental Units are included among the 50,129 Rental Units referred to in the first table.

[6] The results of the survey for the year 1945 show that the financial position of the landlords in 1945 was even better than it was in 1944. See note 5, *supra*. It should be noted, too, that these results understate the improvement of the financial position of the landlords under rent control because they are weighted downward by the deteriorating financial position of landlords owning housing accommodations whose maximum rents are less than $30 (R. 749, 985). The deterioration of the position of these landlords is due not to the impact of the Rent Regulation but to the fact that in a period of full employment and high earnings people do not choose to live in such accommodations, with the result that these landlords have suffered increasing vacancies (R. 495, 768, 969).

The court did not pass upon the question whether the Act, construed so as not to require that landlords generally be permitted a fair return on the fair value of their investment, was constitutional. Petitioners did not raise this question either in the course of the protest proceeding or before the court below. In fact, in their protest, petitioners specifically stated that they were not raising any question of constitutionality.[9]

ARGUMENT

Petitioners argue that a writ of certiorari should be granted in this case because their contention that Section 2 (b) of the Act requires that landlords generally, in the various areas under rent control, be permitted to earn the fair return on investment traditionally afforded public utilities raises an important, unsettled question as to the interpretation of that section of the Act (Pet. 22–24), and that an important consti-

[9] R. 7: "The protestants do not choose to raise any question with respect to the constitutionality of the Emergency Price Control Act of 1942 or with respect to the propriety of establishing, at proper maximum rents, rent control and regulation for said Defense-Rental Area, but they regard an increase of the maximum rents prescribed in the Rent Regulation as justified and necessary"; and R. 2: "The following is a statement of the objections herein raised by the protestants against the provisions of the Rent Regulation; and protestants state expressly that none of said objections is intended to raise any question with respect to the constitutionality of the Emergency Price Control Act of 1942 * * *".

tutional question is presented by the decision below (Pet. 25–27). It is submitted, however, that certiorari should not be granted in this case because (1) the Emergency Court of Appeals was so clearly correct in its construction of Section 2 (b) that review of its decision is not warranted; and (2) in fact, no question as to the constitutionality of the Act as so construed is properly raised.

I. THERE IS NO QUESTION THAT AS A MATTER OF STATUTORY CONSTRUCTION THE ACT DOES NOT REQUIRE THAT MAXIMUM RENTS MUST, TO BE GENERALLY FAIR AND EQUITABLE, PERMIT LANDLORDS GENERALLY TO EARN A FIXED RATE OF RETURN UPON THEIR INVESTMENT

A. THE LANGUAGE OF THE ACT MAKES IT CLEAR THAT THE RENTAL HOUSING INDUSTRY IS NOT TO BE TREATED AS A PUBLIC UTILITY AND GUARANTEED A FAIR RETURN UPON THE FAIR VALUE OF ITS INVESTMENT IN ACCORDANCE WITH TRADITIONAL PUBLIC UTILITY CONCEPTS OF FAIR RETURN AND FAIR VALUE OF INVESTMENT

That the Act did not intend the rents of the rental housing industry to be regulated by the Administrator as would the rates of a public utility is clearly indicated by Section 4 (d), which provides that "Nothing in this Act shall be construed to require any person . . . to offer any accommodations for rent," and thereby makes it plain that the Act is not to be construed as taking the property of the rental housing industry so as to require just compensation.[10] *Bowles* v. *Willingham*, 321 U. S. 503; *Taylor* v. *Bowles*, 145 F. 2d 833 (Em. Ct. App.).

[10] Public utilities were expressly exempted from price control by Section 302 (c) of the Act. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

Section 2 (b) of the Act (*infra* pp. 25–26) merely requires that maximum rents established by the Administrator for defense-area housing accommodations within a particular defense-rental area shall be generally fair and equitable and shall effectuate the purposes stated in Section 1 (a) of the Act. Section 2 (b) sets forth the standards which are to guide the Administrator in establishing such maximum rents. Thus, the Administrator is required to ascertain and give due consideration to the rents prevailing for housing accommodations in the area on or about April 1, 1941, or on or about the most recent date (not earlier than April 1, 1940) by which defense activities did not yet result, or threaten to result, in increases in rents for housing accommodations in the area inconsistent with the purposes of the Act. The Administrator is further required to make adjustments for such relevant factors as he determines and deems to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within the defense-rental area.

The very fact that the Act requires the Administrator to fix maximum rents with reference to rents prevailing as of a particular date demonstrates that the Congress did not intend the Administrator to institute an investigation as to whether the rents prevailing on that date allowed

landlords generally the traditional public utility fair return on the fair value of their investment. Yet it is of course possible that the rents prevailing on the maximum rent date did not allow landlords such a return. Nor does Section 2 (b) specify or indicate that whether landlords are earning a fair return on the fair value of their investment is a relevant factor of general applicability with respect to housing accommodations for which the Administrator shall make adjustments.

Congress in Section 2 (b) merely delegated authority to the Administrator to do what it itself did in the District of Columbia Emergency Rent Act which was under consideration at the same time as the Emergency Price Control Act and was passed December 2, 1941.[11] In that Act the Congress itself established the rents generally prevailing on January 1, 1941, as the maximum rents for the District of Columbia.[12] The Congress made no investigation as to whether the rents on that date allowed landlords in the District of Columbia a fair return on their investment, nor did it direct the Rent Administrator for the District of Columbia to make such an investigation in making rent adjustments.[13]

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[11] 55 Stat. 788, as amended by P. L. 242, 79th Cong., 1st Sess., and P. L. 472, 79th Cong., 2d Sess.

[12] *Id.*, Section 2.

[13] *Id.*, Section 3, which provides that: "Whenever in the judgment of the Administrator a general increase or de-

B. IT HAS BEEN THE CONSISTENT ADMINISTRATIVE PRACTICE TO TEST THE GENERAL FAIRNESS AND EQUITY OF A RENT REGULATION BY COMPARING THE CURRENT FINANCIAL POSITION OF LANDLORDS GENERALLY WITH THEIR POSITION DURING A REPRESENTATIVE PEACE-TIME PERIOD

Since the passage of the Act in January 1942, every Rent Regulation for Housing issued by the Administrator has used the maximum rent date technique of establishing maximum rents. The Administrator, however, has recognized, as did the Congress in requiring him to make adjustments, that increased operating costs incurred by landlords generally since the maximum rent date might reduce the income of landlords generally to the point where the Regulation ceased to be generally fair and equitable. To achieve the purposes of the Act, the Administrator has, since the passage of the Act, taken the position that he would increase maximum rents generally in an area if the current financial position of the landlords under the existing maximum rents was unfavorable as compared with their position during a representative peace-time period, when the area was as yet unaffected by defense and war

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crease since January 1, 1941, in taxes or other maintenance or operating costs or expenses has occurred or is about to occur in such manner and amount as substantially to affect the maintenance and operation of housing accommodations generally * * *, he may by regulation or order increase or decrease the maximum-rent ceiling * * * for such accommodations * * * in such manner or amount as will in his judgment compensate, in whole or in part, for such general increase or decrease".

activities.[14] In the New York City Defense-Rental Area the year 1939 has been determined by the Emergency Court of Appeals to be such a period. That determination is not sought to be reviewed by petitioners in this proceeding.[15] As pointed out in the Statement, *supra*, landlords generally in the New York City Defense-Rental Area are currently earning a net income more than twice that which they earned during 1939.

C. THIS STANDARD OF GENERAL FAIRNESS AND EQUITY HAS BEEN EXPRESSLY RATIFIED AND APPROVED BY THE CONGRESS

The legislative history preceding the passage of the Act clearly shows that the Congress was of the opinion that the income which an industry earned during a representative peace-time period, which was determined by the operation of our

[14] The Administrator adopted the same position under Section 2 (a) of the Act with regard to the price control program.

[15] Although petitioners allege (Pet. 8–9) that the year 1939 "was itself a year of depressed net income in the rental housing industry in New York City, a year in which that industry was unable to earn an adequate return on its investment", they have not shown that the year 1939 was not normal, nor does the petition raise that issue. The court below specifically found that the year 1939 was the "last normal pre-war year in New York City" (R. 963). During that year landlords in general were earning net income and therefore were receiving a return on their investment. Petitioners, in effect, therefore are arguing that either the Act or the Constitution requires that rent control in time of war must permit them to earn a greater return on their investment than that which they earned during a normal pre-war period.

competitive system, was sufficient to sustain it; and that the standards of the Act required no more than that the regulations of the Administrator should not prevent the industry from earning at least that return during the emergency.[16]

Prior to each extension of the Act the Administrator was called upon by the Congress to show that he complied with this base period industry earnings standard of "generally fair and equitable" and to defend its continued use against proposals to amend the Act to provide a different standard. During the course of these proceedings, and particularly in 1944 and 1945, the Administrator carefully elaborated the standards he was using to the Congress and to the public in general.[17]

[16] *I Hearings Before the House Committee on Banking and Currency*, 77th Cong., 1st Sess., on H. R. 5479 (superseded by H. R. 5990), pp. 11, 396, 441, 455, 462–463, 579, 580, 616–618, 830, 968, especially at pages 396 and 463.

[17] The references to the legislative history on this point are voluminous. See, for example, the statement of the Deputy Administrator of the Rent Department of the Office of Price Administration at pages 114–115 of *I Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376; the substantially identical statements made with respect to prices in the testimony of the Deputy Administrator for Price in the same Hearings at pages 55–57; the memorandum of the Office of Price Administration restating the test employed under the standard in Section 2 (a), set forth at pages 1404–1414, especially pages 1404–1408, of the *Hearings Before the Senate Committee on Banking and Currency*, 78th Cong., 2d Sess., on S. 1764; and the Charts concerning comparative earnings position of the various industries in the Appendix to volume I of the House Hearings

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Congress specifically approved the base period earnings standard as the test to determine whether the Regulations of the Administrator were generally fair and equitable [18] and renewed the Act each time without changing this standard.[19]

In fact, in 1944, the then chairman of the Metropolitan Fair Rent Committee, which is sponsoring the present petition, argued the alleged plight of landlords generally in the New York City Defense-Rental Area to the House Committee on Banking and Currency in much the same terms as does the present petition and offered an amendment to Section 2 (b) of the Act which would have specifically required that rent regulations permit the Rental Housing Industry to earn a fair return on its investment.[20] This proposal was not accepted.

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on H. R. 4376 at pp. 1177–1297, particularly pp. 1232, 1235, 1241, 1262–1264, 1283, 1275–1288; and *I Hearings Before House Committee on Banking and Currency*, 79th Cong., 1st Sess., on H. J. Res. 101, p. 88; *Hearings Before the Senate Committee on Banking and Currency*, 79th Cong., 1st Sess., on H. J. Res. 101, p. 101.

[18] H. Rep. No. 764, on H. Res. 101 (79th Cong., 1st Sess.), p. 10; S. Rep. No. 922, on S. 1764 (78th Cong., 2d Sess.), pp. 45–47, 51–53.

[19] This Court has held that the failure of Congress to change a statute when alleged faults in the statute are brought to its attention at committee hearings is of special significance in the construction of the statute. *Corn Exchange Nat. Bank & Trust Co.* v. *Klauder*, 318 U. S. 434.

[20] II *Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376, pp. 1608–

D. IN PASSING UPON THE VALIDITY OF THE ADMINISTRATOR'S REGULATIONS, THE EMERGENCY COURT OF APPEALS HAS CONSISTENTLY UPHELD THE PROPRIETY OF USING THE BASE-PERIOD INDUSTRY EARNINGS STANDARD.

In *Gillespie-Rogers-Pyatt Co., Inc.* v. *Boules*, 144 F. 2d 361, the Emergency Court of Appeals, after referring to the Committee Report cited *supra*, note 18, and the memorandum of the Office of Price Administration, cited *supra*, note 17, stated (at p. 366):

> * * * We think that Congress fully understood and approved the use by the Administrator of the industry earnings and product pricing standards when it extended the Emergency Price Control Act by the enactment of the Stabilization Extension Act of 1944. The use by the Administrator of these standards in the consideration of applications for price increases and the reasons for their use were clearly and forcefully disclosed to both Houses of Congress in connection with the consideration of that act. Not only was the memorandum from which we have quoted before the Committees on Banking and Currency of both Houses but the subject was discussed at the hearings held by the Committees, in the report of the Senate Committee and in

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1629. The text of the proposed amendment was as follows (at p. 1622):

"[and the Price Administrator] shall ascertain and give due consideration to charges for depreciation, deferred maintenance expense and mortgage charges to the end that *owners, generally*, of defense-area housing accommodations shall receive a *fair net return on their investments*." [Italics supplied.]

> the debates. Congress nevertheless continued without any modification the statutory standard—"generally fair and equitable"—which had been thus interpreted by the Administrator.

See, e. g., the following decisions of the Emergency Court of Appeals: *Interwoven Stocking Co.* v. *Bowles,* 141 F. 2d 696; *Birtcherd Dairy, Inc.* v. *Bowles,* 156 F. 2d 1004; *Allied Foods* v. *Bowles,* 151 F. 2d 449; *Chatlos* v. *Brown,* 136 F. 2d 490; *Spaeth* v. *Brown,* 137 F. 2d 669; *Madison Park Corporation* v. *Bowles,* 140 F. 2d 316; *Avant et al.* v. *Bowles,* 139 F. 2d 702; *Equitable Trust Company et al.* v. *Bowles,* 143 F. 2d 735. See also *Wilson* v. *Brown,* 137 F. 2d 348.

It is submitted, in conclusion, that in view of the foregoing, there can be no question whatsoever at this stage of the rent control program that, as a matter of statutory construction, the Act does not require that maximum rents, to be generally fair and equitable, must assure the rental housing industry a fair return upon the fair value of its investment, in accordance with the traditional public utility concept of fair return and fair value. The petition therefore raises no question of statutory construction that warrants review by this Court.

II. THE PETITION DOES NOT PROPERLY RAISE ANY QUESTION CONCERNING THE CONSTITUTIONALITY OF THE ACT AS THUS CONSTRUED BY THE ADMINISTRATOR AND THE COURT BELOW

As has been indicated in the Statement, *supra,* the court below did not pass upon the constitu-

tional question now sought to be raised by petitioners because petitioners never raised this question below. For this reason alone certiorari should be denied. *Sonzinsky* v. *United States,* 300 U. S. 506.

The petition should be denied on the additional ground that the record is barren of any evidence bearing upon the rate of return on investment which the individual petitioners are earning. Petitioners, therefore, have not shown that they come within the class of persons whose rights under the Fifth Amendment are alleged to have been violated. See *Aetna Insurance Company* v. *Hyde,* 275 U. S. 440; *Public Service Commission of Montana* v. *Great Northern Utilities Co.,* 289 U. S. 130. Furthermore, with regard to the evidence as to the rate of return on investment which landlords generally are earning, the court below, in passing upon the proper construction of Section 2 (b), stated (R. 1045):

> In our original opinion we pointed out that there was no satisfactory evidence in the record as to the amount of the industry's investment. Additional evidence, which while not wholly satisfactory, tends to show original cost and present value of a representative group of properties, has now been received.

However, as this Court stated in *Public Service Commission of Montana* v. *Great Northern Public Utilities Co., supra* (p. 137):

> * * * in order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of law.

Petitioners in this case fall far short of meeting that test.

For example, in spite of the implications to the contrary sought to be conveyed by petitioners in their reference to returns after fixed charges at pages 6 and 7 of their petition, the figures in the record purporting to show the investment, on various bases of valuation, of the landlords, generally, represent neither the total of the original costs of the properties surveyed, the actual 1944 value of the investment, the appraised values, nor the sales price of those properties. Instead, those figures were derived by petitioners by applying various formulae to data which they obtained from a sampling of a group of properties whose maximum rents averaged $100 or over (R. 524–547, 1027–1037; R. 814–828).

This sample, combining properties surveyed by the OPA and properties surveyed by petitioners, was unrepresentative since at least 40 of the 56 properties surveyed by petitioners were being held and operated by banks and insurance companies (R. 744, 787, 816, 819).[21] In calculat-

[21] Of the 56 properties in this group surveyed by petitioners (R. 793–801), only six showed interest charges, the remain-

ing return after fixed charges for both the $100 and over group and landlords generally petitioners assumed (Pet. 6–7) that all the properties in the $100 and over group, and in industry generally, are mortgaged, whereas (1) the data presented by petitioners for the $100 and over group shows conclusively that the overwhelming majority of properties in that group was not mortgaged, and (2) virtually one-half of the rental units included within the industry survey [22] were also not mortgaged.[23] This clearly demonstrates that petitioners' assumption as to the interest charges of the $100 and over group and of landlords gen-

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ing 50 being unmortgaged. Cf. the Exhibit at R. 509 which reports interest charges for at least one-half of the 50,129 units in the properties in the June 1945 survey (R. 747, 977–998).

[22] The "industry survey" referred to is the OPA survey of June 20, 1945, appearing at pages 747, 977–998 of the Record

[23] For the convenience of petitioners, the Accounting Department of the Office of Price Administration introduced a breakdown of all properties included in the industry survey of June 20, 1945, listing in a separate Exhibit all the properties which showed charges for both depreciation and interest (R. 509). Only one-half the total number of units in the industry survey were mortgaged (Cf. R. 747 with R. 509). Petitioners computed the percentage which depreciation and interest for only the mortgaged properties bore to the assessed valuation of those properties (R. 536–537). In estimating returns, however, after fixed charges for both the $100 and over group and the industry, petitioners used the percentage figure derived from consideration of mortgaged properties only (R. 517, 537, 540, 541, 821), despite the fact that only one-half of the properties in the groups for which it was estimating returns were mortgaged properties.

erally are wholly unwarranted and the returns after fixed charges which petitioners show are meaningless. Petitioners themselves recognize at least this deficiency in their data with respect to returns after fixed charges and make certain assumptions, in the absence of any data in the record, as to the value of the owners' equities in the properties which, too, are wholly unwarranted.[24] It is interesting to note that even on the basis of their own assumptions as to investment value, depreciation and interest, and value of the owners' equities, petitioners calculate that the industry generally earned a return of 3.15% after fixed charges on the estimated 1944 investment value (Pet. 7). However, in their brief in the court below petitioners conceded that "returns on real estate are customarily measured by the returns after operating expenses but before depreciation and interest in order to avoid the question of whether or not the properties are mortgaged" (Pet. Br. in court below, pages 16, 55). Computing returns on this basis and accepting petitioners' assumptions as to the value of investment for that purpose, petitioners showed that landlords generally during 1944 were earning a return of from 5.35% to 7.5% depending upon which of the bases of valuation suggested by peti-

[24] For example, at page 7 of their petition, petitioners multiply the figures for returns after fixed charges by a factor of 3, in an attempt to overcome the defects in their assumptions as to fixed charges (See Note 23, *supra*).

tioners is adopted (R. 536–537, 820; Pet. Br. in court below, pp. 16, 55). Petitioners contended below that a fair return before depreciation and interest would be between 7% and 8% (Pet. Br. in court below, pp. 30, 56).

Although respondent submits that the figures set forth in the petition (Pet. 7) purporting to show a negative return for landlords owning properties whose maximum rents are $100 or more, do not, as we have explained above, show the actual financial condition of such landlords in general, respondent has not developed this point further because petitioners do not claim that either the Act or the Fifth Amendment requires that this group must be permitted, as a group separate and apart from landlords generally, to earn a fair return on investment.

CONCLUSION

The decision below is correct and there is no warrant for review of the questions presented by the petition. The petition should therefore be denied.

Respectfully submitted.

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DECEMBER 1946.

APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944, 58 Stat. 632,[1] are as follows:

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may

[1] Roman type is used to indicate text which has not been changed since original enactment or issuance and italics are used to indicate amendments.

determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: * * *.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing ac-

commodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs *within such defense-rental area.*[2] In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for*

[2] Added by sec. 102 of the Stabilization Extension Act of 1944.

comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.[3] Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

SEC. 4. (d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in

[3] Added by sec. 102 of the Stabilization Extension Act of 1944.

[4] As amended by sec. 106 of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[5] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was

support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,* the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

SEC. 302. As used in this Act—* * *

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in

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stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

* As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided,* That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

II. Rent Regulation for Housing for New York City Defense-Rental Area (8 F. R. 13914) as amended:

SEC. 4. *Maximum rents.*—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented on March 1, 1943.*—For housing accommodations rented on March 1, 1943, the rent for such accommodations on March 1, 1943.

(b) *Not rented on March 1, 1943 but rented during January or February, 1943.* For housing accommodations not rented on March 1, 1943, but rented at any time during January or February, 1943, the last rent for such accommodations during the two-month period.

(c) *First rent after March 1, 1943 but before November 1, 1943.*—For housing ac-

commodations not rented on March 1, 1943 nor during January or February, 1943, but rented prior to November 1, 1943, the first rent for such accommodations after March 1, 1943. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

(d) *Constructed or changed before November 1, 1943.*—For (1) newly constructed housing accommodations without priority rating first rented after March 1, 1943 and before November 1, 1943, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change: *Provided, however,* That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

(e) *First rent after November 1, 1943.* For (1) newly constructed housing accommodations without priority rating first rented on or after November 1, 1943, or (2) housing accommodations changed on or after November 1, 1943 so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations

not rented at any time between December 31, 1942 and November 1, 1943, or (4) housing accommodations changed on or after November 1, 1943 from unfurnished to fully furnished, the first rent for such accommodations after the change or on or after November 1, 1943, as the case may be. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

SEC. 5. *Adjustments and other determinations.*—In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

(a) *Grounds for increase of maximum rent.*—Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable, only on the grounds that:

(1) *Major capital improvement after November 1, 1943.*—There has been on or after November 1, 1943 a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance.

(2) *Change prior to March 1, 1943.*—There was, on or prior to March 1, 1943, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance or a substantial increase in the services, furniture, furnishings or equipment, and the rent on March 1, 1943 was fixed by a lease or other rental agreement which was in force at the time of such change or increase.

(3) *Substantial increase in services, furniture, furnishings or equipment.*—There has been a substantial increase in the services, furniture, furnishings or equipment provided with the housing accommodations since the date or order determining its maximum rent. No increase in the maximum rent shall be ordered on the ground set forth in this paragraph (a) (3) unless the increase in services, furniture, furnishings or equipment occurred with the consent of the tenant or while the accommodations were vacant: *Provided*, That an adjustment may be ordered, although the tenant refuses to consent to the increase in services, furniture, furnishings or equipment, if the Administrator finds that such increase (i) is reasonably required for the operation of a multiple dwelling structure or other structure of which the accommodations are a part or (ii) is necessary for the preservation or maintenance of the accommodations.

(4) *Special relationship between landlord and tenant.*—The rent on the date determining the maximum rent was materially affected by the blood, personal or other special relationship between the landlord and the tenant and as a result was substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943: *Provided*, That no adjustment under this subparagraph increasing the maximum rent shall be made effective with respect to any accommodations regularly rented to employees of the landlord while the accommodations are rented to an employee, and no petition for such an adjustment will be entertained

until the accommodations have been or are about to be rented to one other than an employee.

(5) *Lease for term commencing one year or more before March 1, 1943.*—There was in force on March 1, 1943, a written lease, for a term commencing on or prior to March 1, 1942, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943; or the housing accommodations were not rented on March 1, 1943, but were rented during January or February, 1943 and the last rent for such accommodations during that two-month period was fixed by a written lease, for a term commencing on or prior to March 1, 1942, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943.

(6) *Varying rents.*—The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a substantially higher rent at other periods during the term of such lease or agreement.

(7) *Seasonal rents.*—The rent on the date determining the maximum rent was substantially lower than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(8) *Substantial increase in occupancy.*—There has been, since March 1, 1943, either

(i) a substantial increase in the number of subtenants or other persons occupying the accommodations or a part thereof under a rental agreement with the tenant, or (ii) a substantial increase in the number of occupants, in excess of normal occupancy for that class of accommodations on March 1, 1943, or (iii) an increase in the number of occupants over the number contemplated by the rental agreement on the date determining the maximum rent, where the landlord on that date had a regular and definite practice of fixing different rents for the accommodations for different numbers of occupants.

(9) *Temporarily exempt from real estate taxes.*—On the date determining the maximum rent the housing accommodations were temporarily exempt from real estate taxes, the landlord was passing the benefit of this tax exemption on to the tenant, and as a result the rent on that date was substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943.

(10) *Priority rating granted on September 1941 application form of Office of Production Management.*—The maximum rent for the housing accommodations is established under section 4 (f), the application for priority rating for the construction of the housing accommodations was filed on the September 1941 form in use by the Office of Production Management prior to the revision of this form on December 15, 1941, the landlord did not make, prior to March 1, 1943, or, if the accommodations were not rented on that date, prior to the first renting of the accommodations after

that date, a written request to the appropriate agency of the United States to approve a higher rent than the rent initially approved because of increased costs of construction, and the maximum rent for the accommodations is substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable accommodations on March 1, 1943, giving due consideration to general increases in costs of construction, if any, in the Defense-Rental Area since March 1, 1943.

This paragraph (a) (10) shall apply only to housing accommodations which were first rented prior to March 29, 1944.

(11) *Peculiar circumstances.*—The rent on the date determining the maximum rent was materially affected by peculiar circumstances and as a result was substantially lower than the rent generally prevailing in the defense-rental area for comparable housing accommodations on March 1, 1943.

(12) *Substantial hardship from increase in property taxes or operating costs.*—Substantial hardship has resulted from a substantial decrease in the net income (before interest) of the property for the current year as compared with a representative period prior to March 1, 1943, due to a substantial and unavoidable increase in property taxes or operating costs.

For the purposes of this paragraph (a) (12) the term:

(i) "Net income (before interest)" means the amount determined by subtracting unavoidable property taxes and operating costs actually paid or accrued from total income earned.

(ii) "Property taxes and operating costs" includes all expenses necessary to

the operation and maintenance of the property actually paid or accrued and properly allocated, including depreciation but excluding interest.

(iii) "Property" includes one or more structures operated as a single unit or enterprise.

(iv) "Total income earned" includes rental and other income earned from the property and the rental value of housing accommodations in the property occupied without the full payment of rent.

(v) "Current year" means a period of twelve calendar months beginning on or after the effective date of regulation. The most recent calendar or fiscal year used by the landlord or the twelve calendar months immediately prior to the filing of the petition for adjustment may be used.

This section 5 (a) (12) shall not apply to maximum rents established under section 4 (f) where the accommodations are first rented after March 1, 1943 or to maximum rents established under section 4 (c), (d) or (e).

(13) *Rented to an employee of landlord.*—The housing accommodations were rented to an employee of the landlord both on the date determining the maximum rent and at the time the order under this paragraph (a) (13) is issued, and after the date determining the maximum rent but prior to the effective date of regulation the landlord and tenant agreed, as the result of a continuous process of bargaining on interrelated matters, upon a wage increase and a rent increase, and the wage increase agreed upon has been put into effect.

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